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INSOLVENCY



June 2007

THE RETENTION OF TITLE CLAUSES: DO THEY REQUIRE REGISTRATION AS A SECURITY INTEREST?

Partner Anne Ferguson and Lawyer Matthew McCarthy discuss a High Court decision that considers whether a supplier's interest under a Retention of Title clause is a registrable security interest under the provisions of the *Chattel Securities Act 1987* (Vic).

The High Court tries to clarify whether retention of title is a registrable security within the meaning of the *Chattel Securities Act 1987* (Vic)

HOW DOES THIS AFFECT YOU?

- The High Court held that the supplier's interest under a Retention of Title (ROT) clause was a 'security interest' within the meaning of the *Chattel Securities Act 1987* (Vic) (the **Act**). As the supplier had not registered its interest under the Act, its security interest was extinguished when the relevant goods were on-sold to a third party.
- The decision has an impact on suppliers of goods in Victoria who commonly enter into arrangements involving ROT clauses. Suppliers should review their arrangements with customers and ensure that where goods are supplied on terms including a ROT clause, and the goods are caught by the Act, they consider registering their security interest or taking other steps to protect their interests.

INTRODUCTION

In *General Motors Acceptance Corporation Australia & Anor v Southbank Traders Pty Ltd¹*, the High Court considered an appeal from the Victorian Court of Appeal² arising out of a dispute between Southbank Traders Pty Ltd (**Southbank**), a motor vehicle wholesaler, and vehicle financier General Motors Acceptance Corporation Australia (**GMAC**).

In 2002, Southbank sold 10 motor vehicles to a company called Kingstrate Pty Ltd (**Kingstrate**), a motor vehicle retailer. The sale agreement contained a ROT clause, under which Southbank retained title to the vehicles until their purchase price was paid in full.

1. [2007] HCA 19.

2. *Southbank Traders Pty Ltd v General Motors Acceptance Corporation & Anor*, [2006] VSCA 102.



After Kingstrate had taken possession of the vehicles, but before it had paid the purchase price to Southbank, Kingstrate on-sold them to GMAC. GMAC then entered into a floor-plan agreement with Kingstrate by which Kingstrate, as bailee, was entitled to display the vehicles to potential purchasers in its retail showroom.

Kingstrate became insolvent, and GMAC registered its interest as bailor of the vehicles under Part 3 of the Act, which provides for the registration of security interests in certain goods, including motor vehicles, trailers and agricultural machinery. Southbank later registered its interest in the vehicles, arising out of the ROT clause. Southbank also began proceedings against GMAC in the Victorian County Court for conversion of the vehicles, or alternatively, for wrongful detention of the vehicles.

Southbank's claim was dismissed by the trial judge on the basis that its interest in the vehicles under the ROT clause was an unregistered 'security interest' within the meaning of the Act, which was extinguished when Kingstrate on-sold the vehicles to GMAC. Southbank successfully appealed to the Victorian Court of Appeal, which held that Southbank's interest in the vehicles under the ROT clause was not a 'security interest' and was not extinguished upon the on-sale of the vehicles to GMAC. GMAC appealed to the High Court.

THE STATUTORY FRAMEWORK – CHATTEL SECURITIES ACT 1987

On appeal to the High Court, the question for determination was, again, whether Southbank's interest in the vehicles under the ROT clause amounted to a 'security interest' under the Act. Section 7(1) provides that where a person holds an unregistered security interest in goods, but is not in possession of the goods, and a purchaser purports to purchase the goods for value, in good faith, and without notice of the person's security interest, that interest is extinguished.

'Security interest' is defined in the Act as:

'an interest in or power over goods (whether arising by or pursuant to an instrument or transaction ...) which secures payment of a debt or other pecuniary obligation or the performance of any other obligation and includes any interest in or power over goods of a lessor, owner or other supplier of goods'.³

GMAC argued that Southbank's interest in the vehicles under the ROT clause fell within that definition, and that the security interest was extinguished when the vehicles were sold to GMAC.

THE HIGH COURT'S DECISION

As noted above, the High Court unanimously found in favour of GMAC, holding that Southbank's interest in the vehicles arising out of the ROT clause was a 'security interest' within the meaning of the Act. As Southbank had not registered its security interest before the vehicles were on-sold to GMAC, Southbank's security interest was extinguished.

In reaching its decision, the court carefully considered the provisions of the Act concerning security interests, and observed that *'the concept of security [under the Act] is not used in any narrow sense'*. It considered that the words *'any interest in or power over goods of a lessor, owner or other supplier of goods'* in the statutory definition of security interest are broad enough to cover the interest of a supplier of goods under a conditional contract of sale, in which title in the goods does not immediately pass to the purchaser.⁴

The High Court rejected the Court of Appeal's finding that:

'it is ... a settled rule at common law that a provision reserving title to the seller until payment of the price (or even of all debts due) does not amount to the creation by the buyer of a right of security in favour of the seller.'⁵

3. At section 3 of the Act.

4. At pars 32-33.

5. Court of Appeal par 41.

It also rejected the distinction drawn by the Court of Appeal on whether a security interest under the Act must be an interest in goods which is created rather than reserved. The court found that the inclusion of the interests of lessors and owners under the statutory definition of security interest negates any argument that the legislation demonstrates an intention to distinguish between interests that are *created* in a transaction, and interests that are *reserved*.⁶

It should be noted that, upon finding that Southbank held an unregistered security interest in the vehicles, the court remitted some matters to the Court of Appeal for further consideration, including the question of whether GMAC could properly be considered a purchaser for value, in good faith, and without notice of Southbank's security interest in the vehicles.⁷

CONTRAST WITH THE ASSOCIATED ALLOYS DECISION

The decision can be contrasted with the High Court's decision in 2000 in *Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd (in liquidation)*.⁸ The issue before the court in that case was whether an interest under a ROT clause constituted a registrable charge under sections 9 and 262 of the Corporations Law.⁹ The court held that the interest under the ROT clause in that case did not constitute a charge. In *Southbank Traders*, the court compared the statutory framework in issue in *Associated Alloys* with the statutory framework under the Act, and noted that:

*'The definition of 'security interest' under the Act, which includes 'any interest in or power over goods of a lessor, owner or other supplier of goods', plainly extends beyond cases of a charge over goods in the form of a contract which confers an interest in goods by way of security for a debt.'*¹⁰

So, the position is that a ROT clause may not be a registrable charge under the Corporations Act but the same clause may create a registrable security interest under the Act.

IMPACT OF THE DECISION

The High Court's decision will have an impact on suppliers of goods on terms including ROT clauses in Victoria, where the goods fall within the ambit of the Act.

Motor vehicles, trailers, agricultural machines and implements, certain marine vessels and other goods prescribed by regulation are all caught by the Act. Where the level of risk of non-payment by the buyer warrants it, suppliers of those goods should ensure that any interest in them arising under a ROT clause is registered to avoid extinguishment of the security interest if the goods are on-sold.

The extinguishment provisions in the Act also apply to security interests in other goods with a purchase price of less than \$15,000.¹¹ However, security interests in those goods cannot be registered under the Act. For those goods, consideration should be given to minimising the risk that the security interest will be extinguished by the subsequent on-sale of the goods.

To what degree this risk can be minimised will depend upon the arrangements between the supplier and buyer and the type of goods concerned. For example, in some situations, it may be possible to ensure that notice of the supplier's security interest is given to any third-party purchaser. Naturally, consideration would need to be given to the level of risk of non-payment by the buyer to ascertain whether the cost of minimising the risk makes sense commercially.

It should be noted that the court's decision is concerned with the legislative position in Victoria. The legislation concerning the registration of security interests in goods varies considerably around Australia. In particular, the relevant legislation in Victoria and Western Australia provides protection to security interests in a wider range of goods than in other Australian states and territories.

6. At par 28.

7. At par 38.

8. (2000) 202 CLR 588; (2000) 171 ALR 568.

9. The predecessor to the current *Corporations Act*.

10. At pars 18-19.

11. Sub-section 7(5) of the Act provides that security interests in unregistrable goods (other than commercial vehicles and farm machinery) are not extinguished by the on-sale of those goods where the purchase price for the goods exceeds \$15,000.

The legislation in the other states and territories is primarily concerned with the registration of security interests in motor vehicles, boats and trailers. Further, the definition of 'security interest' varies across jurisdictions.¹² The Commonwealth's proposal for a single federal Act that regulates personal property security interests and includes a national online register for such interests may eliminate these disparities, but risks introducing other anomalies and uncertainties.

For the moment, however, notwithstanding those variations in the legislative position around the country, the decision in *Southbank Traders* establishes another reason why a ROT clause may not be effective in protecting a supplier where goods have been supplied to a party which, because of insolvency or for some other reason, is unable to account for the proceeds of goods that have been on-sold. Suppliers should consider whether a ROT clause provides them with sufficient protection, or whether some other form of protection is desirable.

12. The relevant legislative provisions can be found in the following enactments:

- *Registration of Interest in Goods Act 1986* (NSW)
- *Motor Vehicles and Boats Securities Act 1986* (Qld)
- *Goods Securities Act 1986* (SA)
- *Chattel Securities Act 1987* (WA)
- *Motor Vehicle Securities Act 1984* (Tas)
- *Sale of Motor Vehicles Act 1977* (ACT)
- *Registration of Interests in Motor Vehicles and Other Goods Act 1989* (NT).



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